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No. _____

In the Supreme Court of the United States

DAVID BRUCE, ROBERT CANADA
AND THOMAS PERZICHILLI,

Petitioners,

v.

THOMAS B. HEFFELFINGER, United States Attorney, District of Minnesota, individually; and ROBERT SMALL, Assistant United States Attorney, District of Minnesota, individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit's summary dismissal of petitioners' appeal for lack of jurisdiction without issuing a written opinion where the timing of petitioners' filing of their notice of appeal relied on a specific Order of the district court stands in direct conflict with this Court's doctrine of "Unique Circumstances" as stated in *Thompson v. INS*, 375 U.S. 384, 386-87 (1964).

2. Whether the Eighth Circuit's summary dismissal of petitioners' appeal for lack of jurisdiction without issuing a written opinion where the timing of petitioners' notice of appeal relied on a specific Order of the district court so far departs from the accepted and usual course of fairness in appellate proceedings under *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 178-79 (1989) as to call for the exercise of this Court's supervisory power.

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Statement of Jurisdiction

The Judgment of the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) granting respondents' motion for dismissal for lack of jurisdiction under Eighth Circuit Rule 47A(b)was entered on February 28, 2005. Petitioners' Petition for Rehearing and Rehearing En Banc was timely filed. The Order of the Eighth Circuit Denying Petition for Rehearing and Rehearing En Banc was entered on May 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C § 1254 (1).

Statement of the Case

This action was brought by Robert Canada, an FBI agent, and David Bruce and Thomas Perzichilli, two local law enforcement officers then assigned to an FBI task force involved in a major drug investigation. At the request of their FBI supervisor, petitioners provided the supervisor with a document describing certain actions of DEA agents affecting the FBI investigation. The document prepared by petitioners was critical of the conduct of the two DEA agents involved in an overlapping drug investigation. The document was subsequently given, over the objections of the FBI supervisor, to respondent Small, who was then acting United States Attorney for the District of Minnesota. Small reacted to the document by terminating the FBI drug investigations being conducted by petitioners and placing petitioners in a "*Giglio*" impaired status, thus barring them from bringing cases to the United States Attorney for prosecution.

Petitioners and the FBI Supervisors, including the Special Agent in Charge (SAC) of the Minneapolis FBI office believed that the *Giglio* impairment placed on the petitioners by respondents was neither warranted nor justified by the *Giglio* policy of the Department of Justice. Unable to resolve the dispute, petitioners, with the approval of their supervisors,

commenced a civil action in state court alleging First Amendment claims and defamation against respondents in their individual capacities. Respondents removed the case to federal court and moved to dismiss the claims under Fed. R. Civ. P. 12 (b). After permitting petitioners to file affidavits from their supervisor and two SACs of the Minneapolis FBI office supporting their claims, the district court dismissed the claims and entered final judgment for the defendants on May 5, 2004.

Following a stipulation by the parties requesting a thirty day extension of time for petitioners to file their notice of appeal to the United States Court of Appeals for the Eighth Circuit (Eighth Circuit), the district court entered an Order dated June 23, 2004, granting petitioners an extension of time until August 5, 2004, to file their Notice of Appeal. The extension of time was requested by petitioners so they could bring a motion to unseal the case before the district court was divested of its jurisdiction pending an appeal. Respondents had obtained an Order sealing the case by motion at the same time they removed the case from state court to federal court.

On July 21, 2004, Respondents moved to extend the time for their response to petitioners' motion to unseal and also requested that the district court further extend the time for petitioners to file their Notice of Appeal. On July 22, 2004, the district court entered an Order granting respondents' motion to extend the time and ordering that petitioners could file their Notice of Appeal from the May 5, 2004, Judgment on or before the 20th day following the court's entry of its Order on petitioners' motion to unseal.

On October 4, 2004, the district court entered an Order granting petitioners' motion and lifting the seal from the case. On October 18, 2004, the fourteenth day following the court's Order unsealing the case, petitioners filed their Notice of Appeal from the May 5, 2004 final Judgment.

On December 15, 2004, respondents filed their motion to dismiss petitioners' appeal for lack of jurisdiction. Petitioners opposed the motion. On February 28, 2005, a panel of the Eighth Circuit entered an Order granting respondents' motion and summarily dismissing petitioners' appeal without written opinion pursuant to Eighth Circuit Rule 47A (b).

On April 6, 2005, petitioners filed a Petition for Rehearing and Rehearing En Banc. On May 12, 2005, the Eighth Circuit entered an Order denying petitioners' Petition for Rehearing and for Rehearing En Banc. This Petition for a Writ of Certiorari to the Eighth Circuit followed.

Statement of Federal Jurisdiction in the Court of First Instance

The action was originally commenced by petitioners in the Fourth Judicial District (Hennepin County) of Minnesota (state court) alleging, *inter alia*, violation of petitioners' rights to freedom of speech under the First Amendment to the United States Constitution. Based on petitioners' constitutional claim, respondents invoked federal jurisdiction and removed the case to federal court.

Argument

I. THIS PETITION MEETS THE COURT'S STANDARD OF COMPELLING REASONS FOR REVIEW ON A WRIT OF CERTIORARI

Petitioners respectfully request that this Court accept review of their petition for writ of certiorari to the Eighth Circuit Court of Appeals. The Eighth Circuit summarily dismissed Petitioners' appeal pursuant to Eighth Circuit Rule 47A (b), for lack of jurisdiction without reaching the merits of petitioners' claim that this Court's doctrine of "Unique Circumstances" required the Eighth Circuit to extend the

filing deadline. The district court's Order relied upon by petitioners for their "unique circumstances" argument had been issued at the request of Respondents. This Order established a new deadline for the filing of petitioners' notice of appeal in unambiguous and precise terms:

> "Upon consideration of the defendants' motion to extend the time within which they may oppose the plaintiffs' pending motion to set aside the order sealing the files and records of this case, and further extending the time within which the plaintiffs may file their Notice of Appeal,
>
> IT IS ORDERED that the defendants shall have until July 30, 2004 to file their opposition to plaintiffs' motion, and
>
> IT IS FURTHER ORDERED that the plaintiffs may file a Notice of Appeal from the May 5, 2004, Judgment dismissing the Complaint on or before the 20th day following the entry of this Court's Order on the plaintiffs' pending motion."

(Order dated July 20, 2004) (Emphasis added)

This was the Order that had been sought by respondents. The petitioners relied in good faith on this Order and met the filing deadlines ordered by the district court. Accordingly, under this Court's doctrine of "unique circumstances", petitioners were entitled to consideration by the Eighth Circuit as to whether it could exercise jurisdiction over the appeal. It is unquestioned doctrine in American law that *stare decisis* requires that once this Court has laid down a principle of law as applicable to a certain state of facts, courts of lower rank will adhere to that principle and apply it to all

future cases where the facts are substantially the same. The Eighth Circuit's summary dismissal of petitioners' appeal without a written opinion explaining their reasons denied petitioners their right to present and argue the merits of their appeal. In so acting, the Eighth Circuit violated the doctrine of *stare decisis* and the accepted and usual course of fairness in appellate judicial proceedings. *See*, Sup. Ct. R. 10(a).

Petitioners submit that the disregard of a party's right to an appeal in a United States Circuit Court of Appeals, such as the Eighth Circuit's unwarranted summary dismissal of their appeal, defeats the Appellate Rules established by this Court and requires the exercise of this Court's supervisory powers. *See*, Sup. Ct. R. 10(a).

Petitioners also submit that the summary dismissal of their appeal is a rejection by the Eighth Circuit of this Court's equitable doctrine of "unique circumstances" as articulated in *Thompson v. INS*, 375 U.S. 384, 386-87 (1964), and of the Eighth Circuit's own decisions in *Schwartz v. Pridy*, 94 F.3d 453, 456 (8th Cir. 1996), *Arnold v. Wood*, 238 F.3d 992, 996-97 (8th Cir. 2001), and *Charles v. Barnhart*, 375 F. 3d 777, 781-82 (8th Cir. 2004). In *Arnold* the Eighth Circuit said:

> "In sum, the 'unique circumstances' doctrine is appropriately cabined to instances in which the district court is unaware of the untimeliness of a post-judgment motion, and the appellant relies upon the court's erroneous representation that the motion is timely."

Arnold at 997.

In this case, the district court was obviously unaware of the fatal jurisdictional flaw in respondents' motion for an extension of time. Petitioners relied on the district court's erroneous Order representing that the filing of their Notice of Appeal within the time specified in the Order would be

timely. These facts were clearly before the Eighth Circuit in its consideration of respondents' motion for summary dismissal of petitioners' appeal. Notwithstanding these facts, the Eighth Circuit summarily dismissed the appeal without comment. Pursuant to Supreme Court Rule 10(a), the Eighth Circuit's disregard for fairness and this Court's precedents demand correction by this Court.

II. THE EIGHTH CIRCUIT'S SUMMARY DISPOSITION GRANTING RESPONDENTS' MOTION TO DISMISS PETITIONERS' APPEAL ON JURISDICTIONAL GROUNDS IGNORES THIS COURT'S DECISIONS REGARDING THE UNIQUE CIRCUMSTANCES DOCTRINE

A. The Petitioners Relied On The District Court's Order in Filing Their Notice Of Appeal

Notwithstanding the jurisdictional prerequisite that is the 60 day time period for filing notices of appeal under Federal Rule of Appellate Procedure 4(a)(5)(A), the circuit courts of appeal are empowered to grant an extension within the narrow confines of the doctrine of "unique circumstances." This Court first established the doctrine in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962). Prior to expiration of the 30 day period within which to appeal the district court's rulings, the district court in *Harris* found excusable neglect and granted the losing party's motion to extend the time to file its notice of appeal. *Id.* at 216. Finding no excusable neglect and noting that the applicable time requirement within which an appeal in that case had to be taken was "mandatory and jurisdictional," the Court of Appeals for the Seventh Circuit dismissed the appeal as untimely. *Harris Truck Lines, Inc. v.*

Cherry Meat Packers, Inc., 303 F.2d 609, 611-12 (7th Cir. 1962). In vacating the decision, this Court stated the following:

> "In view of the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30 day period and then suffers reversal of the finding, it should be given great deference by the reviewing court."

Harris, at 371 U.S. at 217.

This Court determined that the "unique circumstances" of the case were such that the court of appeals "ought not to have disturbed the motion judge's ruling." *Id.*

Soon after *Harris* was decided, this Court, in *Thompson v. INS*, expounded on the "unique circumstances" doctrine by including within its ambit cases wherein a party does an act deemed proper by the district court, which, if indeed properly done, postponed the deadline for the filing of the party's appeal and led to an appeal that was timely under a new but mistaken deadline. *Thompson*, 375 U.S. 384, 387 (1964). This Court later described the doctrine in *Osterneck v. Ernst & Whinney* as excusing tardiness in filing "only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal, and has received specific assurance by a judicial officer that this act has been properly done," *Osterneck*, 489 U.S. 169, 179 (1989).

The "unique circumstances" doctrine applies squarely to the circumstances of petitioners' filing of their notice of appeal to the Eighth Circuit. Petitioners first obtained a proper 30 day extension of time pursuant to Federal Rule of Appellate Procedure 4(a)(5)(A) to file their notice of appeal. This was to give the court time to rule on their motion to

remove the seal placed on the case before the district court was divested of jurisdiction pursuant to the appeal.

With three weeks remaining under the first and proper extension of time for petitioners to file their notice of appeal, respondents moved for a further, and improper, extension of the time for petitioners' to file their notice of appeal. The reason given by respondents' for their motion was that their counsel had a busy trial schedule. The district court granted respondents' motion and ordered that "the plaintiffs may file a Notice of Appeal from the May 5, 2004, Judgment dismissing the Complaint on or before the 20th day following the entry of this Court's Order on the plaintiffs' pending motion." (District Court's Order dated July 22, 2004)

Petitioners filed their notice of appeal within the 20 day period ordered by the court following the district court's Order lifting the Seal. Clearly, neither the district court nor petitioners' counsel believed that petitioners' actions in following the court's order would make their notice of appeal untimely. Shortly after petitioners' filed their notice of appeal, respondents moved for a summary dismissal of the appeal on grounds that petitioners' appeal was untimely.

Whether respondents, represented by counsel from the litigation and appellate divisions of the United States Department of Justice, knew that their motion would blind-side the district court and the petitioners and create an issue of jurisdiction is not clear. In circumstances like these, where an untimely filing is prompted by the motion of the non-appealing party, the Eighth Circuit's summary dismissal sends a message to the government that such tactics may succeed in misleading a district court and thereby derail an appeal. Such tactics would unquestionably create disrespect for the rule of law and incivility between litigants.

An Order by a district court granting the motion of the respondents to improperly extend the time for filing an appeal and relied upon by the petitioners to their detriment present

precisely the circumstances that should provide petitioners with a jurisdictional "safe harbor" under the "unique circumstances" doctrine. Having relied upon the district court's order permitting them additional time to file their notice, the petitioners should not now pay the price of dismissal when the district court's error was brought on by respondents' action.

B. The Eighth Circuit's Summary Dismissal of Petitioners' Appeal Violates The Doctrine of Unique Circumstances

The Eighth Circuit's summary dismissal also stands for the proposition that the petitioners' case does not fit within the four corners of the "unique circumstances" doctrine. That disposition directly conflicts with this Court's decision in *Thompson*. At a minimum, the Eighth Circuit should be required to describe its legal reasons for finding that the petitioners' reliance on the district court's Order failed to meet this Court's standard of "unique circumstances."

In *Schwartz*, the Eighth Circuit discussed this Court's explanation of the narrow exception to Federal Rule of Appellate Procedure 4(a)(1) regarding a timely notice of appeal and said (quoting *Osterneck v. Ernst & Whinney*, 489 U.S.169, 178-79 (1989)):

> "When a party has relied on the specific statement of the district court that his notice of appeal is timely, however, fairness dictates that we deem the notice to be timely filed."

The circumstances of petitioners' untimely notice of appeal clearly fall within the narrow parameters of the "unique circumstances" doctrine.

III. CONCLUSION

Petitioners' actions relying on the district court's Order that they could file a timely notice of appeal within the times stated by that Order meet this Court's standard for application of the equitable doctrine of "unique circumstances." This Court should grant this petition and directly address the failure of the Eighth Circuit to apply the doctrine to petitioners' appeal of their case.

Respectfully submitted,

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STATE OF MINNESOTA **DISTRICT COURT**
COUNTY OF HENNEPIN FOURTH JUDICIALDISTRICT

Case Type: Other Civil

David Bruce, Robert Canada and Thomas Perzichilli, Court File No. _____

Plaintiffs,

vs.

Thomas B. Heffelfinger, United States Attorney, District of Minnesota, individually; and

COMPLAINT

Jury Trial Demand

Robert Small, Assistant United States Attorney, District of Minnesota, individually,

Defendants.

NATURE OF THE CASE

1. Plaintiffs David Bruce, Robert Canada and Thomas Perzichilli bring this action against the defendants individually alleging claims under the ***Bivens*** doctrine (First Amendment - Protected Speech), and common-law claims for defamation and negligent infliction of emotional distress. This is an action brought against federal officers individually as provided in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U. S. 388 (1971).

THE PARTIES

2. The plaintiff David Bruce ("Bruce") resides in the City of Zimmerman, County of Isanti, State of Minnesota. He is fully certified and licensed as a police officer in the State of Minnesota. At all times relevant to this action, Bruce was, and is, a deputy sheriff with the Hennepin County Sheriffs Department. In 2001, he was assigned to the Federal Bureau of Investigation ("FBI") as a task force officer conducting two

Title III narcotics investigations.

3. The plaintiff Robert Canada ("Canada") resides in the City of Eagan, County of Dakota, State of Minnesota. At all times relevant to this action, Canada is and was a Special Agent ("SA") of the Federal Bureau of Investigation ("FBI") assigned to its Minneapolis Bureau office. SA Canada was the case agent in 2001 for two Title III investigations working with Bruce and Perzichilli and other law enforcement officers.

4. Plaintiff Thomas Perzichilli ("Perzichilli") resides in the City of Weston, Florida. Perzichilli is presently employed by the Department of Homeland Security as a Special Agent with the United States Secret Service. During the spring and summer of 2001, Perzichilli was fully certified and licensed as a police officer employed by the St. Paul Police Department. In 2001, he was assigned from the St. Paul Police Department to the FBI as a task force officer conducting two Title III narcotics investigations and working with Bruce, SA Canada and others.

5. Defendant Thomas B. Heffelfinger ("Heffelfinger") is the United States Attorney ("USA") for the State of Minnesota. He was appointed to be the USA for the District of Minnesota in September of 2001.

6. Defendant Robert Small ("Small") is presently an Assistant United States Attorney ("AUSA") for the District of Minnesota. For a period of time in 2001, until the appointment of Heffelfinger as the USA, Small was Acting USA for the District of Minnesota.

FACTS

7. The FBI and the Drug Enforcement Administration (DEA) are federal law enforcement agencies located within the U.S. Department of Justice. In the late spring of 2001, the FBI and DEA were conducting three separate but overlapping drug investigations under the prosecutorial oversight of the United States Attorney's Office (USAO) for the District of

Minnesota, including AUSA Steve Logan.

8. Plaintiffs were conducting two of these investigations. One of the plaintiffs' FBI investigations was a court-approved Title III investigation involving a wire intercept and targeting a suspected major drug organization. In early May of 2001 plaintiffs became aware of an overlapping investigation conducted by DEA Special Agent ("SA") Harry Tideswell and DEA Task Force Agent ("TFA") Tim Shanley. Shanley was an agent assigned to DEA from the Minnesota Bureau of Criminal Apprehension ("BCA").

9. Significant investigative friction and lack of cooperation developed between the investigation conducted by plaintiffs and the DEA investigation conducted by Tideswell and Shanley. AUSA Logan instructed the FBI and DEA to work more closely together and to share information concerning certain government witnesses involved with the investigations.

10. DEA SA Tideswell and TFA Shanley refused to share certain information they had with the plaintiffs regarding an overlapping government witness under their direction, and refused to cooperate with plaintiffs' FBI Title III investigation.

11. As a result of the plaintiffs' and the FBI's inability to talk to the overlapping government witness, the U.S. District Court Judge assigned to the case denied authorization for an extension of the wire intercept in the Title III investigation. Without said extension, the FBI Title III wire intercept had to be shut down before the FBI was able to identify all of the major figures in the drug organization under investigation.

12. On Friday, May 25, 2001, Ray Morrow, the FBI Assistant Special Agent in Charge ("ASAC") of the Minneapolis office, returned from a two week trip out of the country. He was immediately advised by plaintiffs' supervisor, Supervisory Special Agent ("SSA") Gregory Boosalis, that the Title III investigation conducted by the

plaintiffs targeting the major drug organization had expired and was about to be shut down. Boosalis told Morrow that the court had refused to authorize a thirty day extension due to the existence of a government witness being operated by the DEA, and that plaintiffs' access to the witness had been blocked by the local DEA's SA Tideswell and TFA Shanley.

13. On May 25, 2001, after talking with Boosalis, Morrow immediately contacted DEA ASAC Skip Van Patten and asked for permission for FBI agents to interview the government witness. Van Patten refused Morrow's request but agreed to meet with Morrow on May 29, 2001 to discuss and attempt to resolve the issue of FBI access to the witness.

14. After talking to Van Patten, Morrow contacted Boosalis to tell him of the meeting with Van Patten. Morrow asked Boosalis to direct SA Canada and the other plaintiffs to provide a written summary and time line for Morrow describing what had transpired regarding the issues of friction and lack of cooperation between the plaintiffs and DEA while Morrow was out of the country.

15. At Boosalis' direction, plaintiffs prepared written notes entitled "Chain of Events." These notes summarized their knowledge of the issues concerning friction and lack of cooperation between them and DEA SA Tideswell and TFA Shanley. These notes were of public concern, and therefore protected speech, because they addressed issues of possible misconduct by federal law enforcement officers.

16. The "Chain of Events" notes described actions and conduct by Tideswell and Shanley that the plaintiffs believed were improper and which they believed had interfered with their efforts to obtain information essential to the continuation and success of the FBI Title III Investigation.

17. On May 29, 2001, before the scheduled meeting between Morrow and Van Patten started, Morrow received a phone call from AUSA Paul Murphy. Murphy told Morrow he wanted Morrow and Boosalis to come to the USA's office

for a meeting with him and AUSA Logan and DEA's Van Patten and SSA Gary Davis to discuss the FBI's Title III investigation and the DEA's investigation. Morrow informed Murphy that he and Van Patten had a meeting scheduled later that same morning to discuss the investigations. Morrow told Murphy that he believed that he and Van Patten could resolve the issues concerning the two investigations. Morrow asked Murphy for a delay in the meeting at the USA's office until after Morrow met with Van Patten. Murphy refused Morrow's request and told Morrow to cancel his meeting with Van Patten. Murphy ordered Morrow, to be at the USA's office for a meeting at eleven o'clock that morning.

18. To prepare himself for the meeting at the USA's office, Morrow reviewed the "Chain of Events" notes provided to him by the plaintiffs.

19. The May 29, 2001 meeting at the USA's office was attended by AUSAs Murphy and Logan, DEA ASAC Van Patten, DEA SSA Davis, FBI ASAC Morrow and FBI SSA Boosalis.

20. During the course of the meeting, Boosalis pulled his copy of the "Chain of Events" notes from his briefcase, briefly reviewed them and returned them to his briefcase. Murphy told Boosalis and Morrow that he wanted to see the notes that Boosalis had just reviewed and returned to his briefcase. Morrow and Boosalis replied that the notes were personal, and not for dissemination to others or for any investigative file. Morrow and Boosalis refused to give Murphy the notes due to the sensitive nature of the notes and the trust and confidence the plaintiffs had placed in Boosalis and Morrow to keep the notes private.

21. After the meeting, Morrow was notified by FBI SAC Domin that he had received a phone call from defendant Acting USA Small. Small told Domin that he wanted to see the notes that Morrow and Boosalis had refused to give to Murphy at the meeting. Morrow provided his copy of the

notes to Domin, explained that the notes had been prepared by the plaintiffs at Morrow's direction, and suggested that Domin not provide a copy to Small.

22. Small arrived at SAC Domin's office on May 29, 2001 and demanded the notes. SAC Domin, acting in good. faith and in an attempt to make Acting USA Small aware of the FBI's concerns regarding the issues with the DEA, explained the purpose and origin of the "Chain of Events" notes and provided Small with a copy.

23. The "Chain of Events" notes were critical of the conduct of DEA Special Agent Tideswell and TFA Shanley.

24. TFA Shanley was well liked and popular with a number of Assistant USAs and had close personal friendships with Assistant USAs Andrew Dunn and Susan Nolting Burke.

25. On May 29, 2001, after reviewing the "Chain of Events" notes given him by SAC Domin, defendant Small contacted the Executive Office of the United States Attorneys ("EOUSA"). Small requested an investigation of plaintiffs' conduct in preparing the notes. Small informed the EOUSA that plaintiffs' had made false statements in the notes and that such conduct was dishonest and improper. Small did not request any similar investigation into the conduct of Tideswell and Shanley despite the allegations regarding their conduct described in the notes.

26. When Small contacted EOUSA he knew that the notes had been prepared by plaintiffs at the direction of plaintiffs' supervisors to assist the FBI in resolving the friction between the FBI and DEA investigations.

27. Small's request for an investigation of plaintiffs because they prepared the "Chain of Events" notes was made in bad faith, with ill will and malice, and motivated by a desire to harm and embarrass the plaintiffs and the Minneapolis office of the FBI. Small was also motivated by a desire to protect the reputations of SA Tideswell and TFA Shanley because of Shanley's friendships with several

AUSAs.

28. On June 4, 2001, before any investigation of plaintiffs by DOJ had commenced, Small told Domin and Morrow to come to his office. Small informed Domin and Morrow that the "Chain of Events" notes had been turned over to EOUSA for investigation.

29. At this same meeting, Small told Domin and Morrow that he wanted the spin-off Title III investigation of the second major drug organization to be immediately shut down because of the serious "Giglio" issues created by the conduct of the plaintiffs in writing the "Chain of Events" notes. Small also told Domin and Morrow that plaintiffs' conduct involved "serious violations."

30. Small's statements to SAC Domin and ASAC Morrow about the conduct of plaintiffs were unwarranted and without any merit or factual basis.

31. Based upon his position as Acting USA and his experience as a federal prosecutor, Small knew that plaintiffs' conduct in preparing the "Chain of Events" notes and giving the notes to their supervisors Boosalis and Morrow was constitutionally protected speech and did not violate any aspect of the DOJ/FBI Giglio policy. Small also knew that such communications between FBI supervisors and their agents regarding suspected misconduct of other law enforcement agents are considered confidential, private and essential to the task of insuring the integrity of federal law enforcement agencies.

32. Numerous attempts by FBI SAC Domin in June of 2001 to restart or salvage the Title III investigations were blocked by defendant Small.

33. Domin's efforts in June and July of 2001 to address or correct any perceived "Giglio" issues, including placing these issues before a U.S. District Court Judge, were also rebuffed by defendant Small. Small made it clear to FBI officials including SAC Domin that only the FBI authors of the notes,

- the plaintiffs - and not the DEA agents, were subject to the "Giglio" cloud raised by him as the acting USA of the District of Minnesota.

34. In June of 2001, defendant Small also told SAC Domin that SA Canada "is a fucking moron."

35. Small did not raise any "Giglio" issues with the DEA concerning the conduct of Tideswell or Shanley.

36. After reviewing the "Chain of Events" notes and complaint submitted. by defendant Small, the Office of Professional Responsibility for the Department of Justice ("OPR/DOJ") determined that any investigation into plaintiffs' alleged misconduct as requested by Small was unwarranted and without factual basis.

37. OPR/DOJ referred the "Chain of Events" notes to DEA for its review, and possible investigation. The Office of Professional Responsibility for DEA conducted an investigation entitled "OPR Investigation IGP- PR- 01- 4128 - False Statement Allegation." Formal statements of the plaintiffs were taken by DEA/OPR and FBI/OPR Inspectors in connection with this investigation. No allegations of misconduct by the plaintiffs were substantiated by this or any other investigation concerning the "Chain of Events" notes.

38. The Office of Professional Responsibility for the FBI also reviewed the "Chain of Events" notes and concluded that there was no evidence of potential misconduct by the plaintiffs as alleged by Small warranting any investigation by OPR/FBI.

39. Pursuant to the decision in *Giglio v. United States*, 405 U.S. 150 (1972) and subsequent U.S. Supreme Court decisions following and interpreting *Giglio*, the Department of Justice and the United States Treasury Department have adopted policies for the disclosure by federal prosecutors of potential impeachment material concerning law enforcement witnesses in pending criminal cases.

40. Under the DOJ's *Giglio* policy, potential impeachment

information is (a) any finding of misconduct that reflects upon the truthfulness or bias of an employee, including a finding of lack of candor during an administrative inquiry; (b) any past or pending criminal charge brought against the employee; and (c) any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee who is the subject of a pending investigation.

41. Referring to a law enforcement officer as *Giglio* impaired implies that an officer is not truthful or credible as a government witness.

42. The DOJ's *Giglio* Policy ("*Giglio*") states that allegations that cannot be substantiated, are not credible, and have resulted in the exoneration of an employee are not considered to be potential impeachment information. Small's allegations that plaintiffs made false statements were not substantiated and were not credible.

43. The *Giglio* policy does not make an FBI agent subject to the policy simply because that agent makes an allegation of misconduct against another law enforcement officer.

44. Defendant Small told SAC Domin and other FBI officials that all three of the plaintiffs were subject to *Giglio* concerning Disclosure of Potential Impeachment Information because of their misconduct and for that reason they would not be allowed to bring cases to the USA's office for charging or prosecution.

45. Small knew when he made said statements to SAC Domin that his statements about the plaintiffs were not warranted under the *Giglio* policy.

46. Upon his appointment in September of 2001 as USA for the District of Minnesota, defendant Heffelfinger reviewed the files and records of the USA's office, and interviewed defendant Small and other AUSAs to determine if the plaintiffs' past conduct in any way warranted a *Giglio* impairment. By this time, Heffelfinger and Small knew that both the OPR/DOJ and OPR/FBI had reviewed the "Chain of

Events" notes and found no evidence of misconduct or potential misconduct by plaintiffs that warranted any investigation.

47. On various occasions in 2002, including on or about August 26, 2002, defendant Heffelfinger told FBI SAC Pierce and Hennepin County Sheriff McGowan that the plaintiffs were *Giglio* impaired. When he spoke to Pierce and McGowan, Heffelfinger knew that his statements that the plaintiffs were *Giglio* impaired were not justified by DOJ *Giglio* policy, were false and defamatory, and that said statements w 'd severely damage the credibility and integrity of plaintiffs as law enforcement officers.

48. Heffelfinger also knew that the "Chain of Events" notes were protected speech under the First Amendment and that the *Giglio* impairment of plaintiffs was retaliation for their exercise of their constitutional rights under the First Amendment to the United States Constitution by preparing the notes for their supervisors..

49. On various occasions in 2002 and 2003, FBI SAC Pierce and Hennepin County Sheriff McGowan requested that defendant Heffelfinger provide them with written justification for the *Giglio* impairment of Canada (Pierce) and Bruce (McGowan). Defendant Heffelfinger refused to provide either Pierce or McGowan with any such justification.

50. Because of defendants' actions applying *Giglio* to Canada and prohibiting Canada from being a material witness in any FBI investigation presented to the USA, Canada has been removed from such FBI investigative assignments.

51. Criminal cases involving individuals charged with-drug-related crimes in U. S. District Court for the District of Minnesota have been dismissed by the defendants in 2001 and 2002 because Bruce was a material witness in said cases. Bruce's conduct did not justify such dismissals of criminal cases and the defendants knew that said dismissals were not justified by Bruce's conduct.

52. Because of defendants' actions, Bruce has been removed from all Hennepin County Sheriffs Department investigative assignments that could make him a material witness in any criminal investigation. Because of the *Giglio* impairment placed on Bruce by the defendants, he has been transferred out of narcotics investigation, denied a promotion, and assigned to non-investigative duties as a deputy sheriff.

53. Contrary to the repeated, false and defamatory statements of defendants Small and Heffelfinger, the plaintiffs' conduct did not and does not meet the policy requirements and/or standards of DOJ or the U.S. Treasury Department requiring *Giglio* notification or any *Giglio* impairment of their roles and function as investigators or witnesses in a federal criminal case.

54. All efforts of the plaintiffs and the FBI to resolve the *Giglio* issues raised by the defendants have been rejected by the defendants.

55. In April of 2003, The FBI Office of Professional Responsibility refused to re-visit or conduct a new inquiry relating to SA Canada and the "Chain of Events" notes because it did not see any misconduct warranting investigation. (See Exhibit A, attached hereto.)

56. The above-described conduct of the defendants has directly and proximately caused the plaintiffs irreparable damage in their law enforcement careers and has directly and proximately caused permanent and severe damage to their reputations as law enforcement officers.

CLAIMS FOR RELIEF

COUNT ONE - VIOLATION OF FIRST AMENDMENT RIGHTS (PROTECTED SPEECH) UNDER *BIVENS* DOCTRINE

As and for their first claim for relief against the defendants, and each of them, the plaintiffs Bruce and Perzichilli reallege each foregoing allegation as if fully set forth hereunder and further allege as follows:

57. The individual defendants have acted with malice and reckless indifference to deprive plaintiffs of their constitutionally protected rights to free speech under the First Amendment.

58. The defendants knew or should have known that the "Chain of Events" notes produced by plaintiffs at the direction of their supervisors were protected speech under the First Amendment to the United States Constitution.

59. Because the defendants knew that their actions clearly violated the plaintiffs' constitutional rights of free speech, they are not entitled to any immunities for their conduct.

60. The actions of the individual defendants have deprived plaintiffs of their right to free speech as guaranteed by the First Amendment to the Constitution of the United States in a manner that defendants should have known transgresses plaintiffs' right to speak freely of matters of public concern.

61. The defendants knew that their actions would cause damages to the plaintiffs and deprive them of their First Amendment rights to protected speech. The conduct of the defendants violated clearly established constitutional rights of which a reasonable person would have known.

62. Plaintiffs Bruce and Perzichilli have no other statutory, administrative or procedural rights other than this action for relief and/or remedy for the constitutional injury caused them by the defendants' actions as described herein.

63. The defendants' actions have caused substantial damages to Bruce and Perzichilli thereby rendering the individual defendants, and each of them, liable to the plaintiffs for compensatory and punitive damages in such amounts as may be determined at trial, plus the plaintiffs' attorney fees and costs and such further relief as the Court or Jury deem appropriate.

COUNT TWO - DEFAMATION

As and for their next claim against the defendants, and

each of them, plaintiffs Bruce, Canada and Perzichilli reallege each foregoing allegation as if fully set forth hereunder and further allege as follows:

64. Defendants have knowingly made false and defamatory statements to plaintiffs' employers and others about their professional conduct and performance as law enforcement officers and investigators. Said statements by the defendants constitute defamation *per se*.

65. Defendants have knowingly made false and defamatory statements to others that plaintiffs were *Giglio* impaired meaning that plaintiffs were not truthful or credible as material witnesses in a criminal case. Said statements by the defendants constitute defamation *per se*.

66. Defendant Small's statement to FBI SAC Domin that SA Canada "is a fucking moron" was false, defamatory and malicious, reflecting a motive by Small of ill will and malice in making said statement.

67. Such statements by defendants have damaged plaintiffs' reputations in their employment and in their community, both personally and professionally.

68. Plaintiff Perzichilli, when applying for other jobs, is required to report and thereby self publish the false allegations and statements of defendants that he was not truthful or credible as implied by being *Giglio*'ed by the defendants in their authority as USAs of the District of Minnesota.

69. As a direct and proximate result of defendants' conduct, plaintiffs have suffered and will suffer a loss of professional reputation, loss of job opportunities, lost wages, lost fringe benefits and substantial emotional anguish.

COUNT THREE - NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

As and for their next claim against defendants and each of them, plaintiffs reallege each foregoing allegation as if fully set forth hereunder and further allege as follows:

70. The defendants' conduct toward plaintiffs was willful, wanton, and careless, was extreme and outrageous, and a direct invasion of plaintiffs' rights.

71. As a direct and proximate result of defendants' wrongful actions against them, plaintiffs have sustained mental and emotional anguish and distress, in addition to economic injuries and injuries to their personal and professional reputations and careers.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for Judgment against the defendants as follows:

1. On **Count One**, awarding the plaintiffs Bruce and Perzichilli all the relief available under the *Bivens* Doctrine and applicable statutes for their constitutional injury, including without limitation the following:

(a) Awarding the plaintiffs Bruce and Perzichilli, and each of them, compensatory damages in the amount of $300,000 or in such higher amounts as the Jury may determine;

(b) Awarding them their reasonable attorney's fees, costs, and disbursements;

(c) Ordering the defendants to immediately declare that the plaintiffs are not and never should have been subject to any *Giglio* impairment;

(d) Ordering such further and additional relief as is deemed necessary or appropriate to place the plaintiffs in the same position they would have been in had no deprivation of their constitutional right to free speech occurred; and

(e) Awarding the plaintiffs such further legal

and equitable relief as the Court and/or Jury may deem appropriate.

2. On **Counts Two and Three**:

   (a) Awarding the plaintiffs, and each of them, compensatory damages in an amount not less than $50,000 or in such higher amount as the Jury may determine;

   (b) Awarding the plaintiff their costs and disbursements; and

   (c) Awarding the plaintiffs such further legal and equitable relief as the Court and/or Jury may deem appropriate.

PLAINTIFFS DEMAND A JURY TRIAL ON ALL CLAIMS.

Dated: 5-22, 2003

MAVITY & ASSOCIATES
Attorneys for Plaintiffs
By: s/_____
William J. Mavity
Attorney Reg. No. 143716
425 West Third Street
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ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorneys fees may be awarded pursuant to Minn. Stat. §549.211, subd. 2, to the party against whom the allegations in this pleading are asserted.

Dated: 5-22, 2003

MAVITY & ASSOCIATES
Attorneys for Plaintiffs
By: s/_____
William J. Mavity

Exhibit A

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE Date: 04/22/2003

To: Minneapolis Attn: SAC Debbie Pierce
(Personal Attention)

From: Office of Professional Responsibility
Initial Processing Office/Room 11102
Contact: SSA Sharon E. Slattery

Approved By: SSA Sharon E. Slattery

Drafted By: Slattery Sharon E

Case ID #: 263-0

Title: SA Robert Canada
Information Concerning

Synopsis: To advise SAC, Minneapolis, that the Office of Professional Responsibility (OPR) will not initiate an OPR inquiry relating to SA Robert Canada and the "chain of events" document.

Details: SAC, Minneapolis requested OPR to re-visit the "chain of events" document issue as it related to SA Robert Canada, Minneapolis Division. OPR further reviewed the Drug Enforcement Administration (DEA) OPR investigative report, requested input from OPR Unit Chief Thomas Monroe and SSA Russell Bransford (the FBI SSA assigned to assist OPR DEA in their investigation into this matter), and had considerable discussion with OPR Deputy Assistant Director (DAD) J.P. Weis, regarding Minneapolis' request to reconsider initiating an OPR inquiry. A determination was made by OPR that there is no merit to the initiation of an OPR inquiry regarding SA Canada's actions. OPR can not open an inquiry to "clear" the name of an employee with another Agency, in this case DEA, when OPR does not see any misconduct. If new information is developed that warrants OPR to reconsider this issue, SAC, Minneapolis is requested to provide that information to SSA Sharon E. Slattery, Initial Processing Unit, OPR, Room 11102, FBIHQ.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
03-3406-WKU

DAVID BRUCE, ROBERT CANADA, and
THOMAS PERZICHILLI,
Plaintiffs,

vs. UNDER SEAL

THOMAS B. HEFFELFINGER,
UNITED STATES ATTORNEY FOR
THE DISTRICT OF MINNESOTA,
Individually,

and

ROBERT SMALL, ASSISTANT UNITED
STATES ATTORNEY FOR THE
DISTRICT OF MINNESOTA,
Individually,
Defendants.

JUDGMENT

IT IS ORDERED that the complaint is dismissed and judgment shall be entered for the defendants.

Dated May 5, 2004.

BY THE COURT
s/
Warren K. Urbom
United States Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

DAVID BRUCE, ROBERT CANADA, AND THOMAS PERZICHILLI,	)
	) NO. 03-3406-WKU
PLAINTIFFS,	) **UNDER SEAL**
	)
vs.	)
	)
THOMAS B. HEFFELFINGER, UNITED STATES ATTORNEY FOR THE DISTRICT OF MINNESOTA INDIVIDUALLY, AND	)
	)
ROBERT SMALL, ASSISTANT UNITED STATES ATTORNEY FOR THE DISTRICT OF MINNESOTA INDIVIDUALLY.	)
DEFENDANTS.	)

MEMORANDUM AND ORDER ON THE "SCOPE OF EMPLOYMENT" ISSUE AND THE DEFENDANTS' MOTION TO STRIKE

On or about May 22, 200.3, the plaintiffs, David Bruce, Robert Canada, and Thomas Perzichilli, filed a three-count complaint against Defendants Thomas B. Heffelfinger and Robert Small. Specifically, the plaintiffs alleged that the defendants violated Mr. Bruce's and Mr. Perzichilli's First Amendment rights, (Count I), defamed each of the plaintiffs, (Count II), and negligently inflicted emotional distress upon each of the plaintiffs, (Count III). On June 23, 2003, the defendants moved to dismiss the complaint. (See filing 7.) In a memorandum and order dated September 29, 2003, I granted the defendants' motion in part. (See filing 11.) Specifically, I concluded that Count I must be dismissed for

failure to state a claim upon which relief may be granted, that the plaintiffs' claims were partially non-justiciable, and that the defendants were entitled to absolute immunity with respect to certain features of the plaintiffs' claims. (See id. at 24-25.) With respect to the remaining claims, I noted that the defendants moved to substitute the United States as defendant pursuant to 28 U.S.C. § 2679(d), and, that the Attorney General's designee certified that the defendant were acting within the scope of their employment at relevant times. (See filing 11 at 21-22.) I also noted that while this certification did not establish conclusively that the defendants' challenged conduct was within the scope of their employment, it constituted prima facie proof of that fact, and the plaintiffs were therefore required to come forward with specific evidence to rebut the certification. (See id. at 22 (citing McAdams v. Reno, 64 F.3d 1137, 1144-45 (8th Cir. 1995)).) The plaintiffs argued that the facts alleged in their complaint, when taken as true, are sufficient to rebut the certification. I rejected this argument. (See id. at 22-24.) However, the plaintiffs also argued that they should be granted an opportunity to submit additional evidence on the "scope of employment" issue. (See id.) Although the plaintiffs should have submitted such evidence in opposition to the defendants' motion to dismiss, (see id. at 24 (citing Anthony v. Runyon, 76 F.3d 210, 215 (8th Cir. 1996))), I granted their request, (see id. at 24-25). Their evidence, along with evidence submitted by the defendants in rebuttal, is now before me. (See filings 14-18, 22-23.) Also before me is the defendants' motion to strike portions of the plaintiffs' evidence, (filing 21). I conclude that, even if I consider the evidence that the defendants find objectionable, the plaintiffs have failed to meet their burden of rebutting the certification.

ANALYSIS

As I noted in my prior memorandum, the plaintiffs' defamation claims are based upon the defendants' allegedly

false statements that the plaintiffs were "Giglio impaired,"[1] committed "violations," or committed "misconduct," (collectively, the "Giglio statements"); and Defendant Small's statement that Mr. Canada "is a fucking moron," (the "Canada statement"). (See filing 11 at 23, see also id. at 1-5.) The "Giglio statements" were allegedly made to the Executive Office of the United States Attorneys (EOUSA), FBI Special Agent in Charge (SAC) Domin, FBI Assistant Special Agent in Charge (ASAC) Morrow, FBI SAC Pierce, other unnamed FBI officials, a Sheriff McGowan, the plaintiffs' employers, and unnamed "others." (See id.) The Canada statement was allegedly made to SAC Domin. (See id.) In my memorandum I also stated,

> "State law governs a scope of employment determination." McAdams v. Reno, 64 F.3d 1137, 1145 (8th Cir. 1995). In Minnesota, in cases involving intentional torts such as defamation, the scope of employment determination is guided by the following principles:
>
> > An agent is acting within the scope of his employment when he is performing services for which he has been employed or while he is doing anything which is reasonably incidental to his employment. The conduct must occur within work-related limits of time and place. The test is not necessarily whether the specific conduct was expressly authorized or forbidden by the principal but rather whether such conduct should fairly have been foreseen from the nature of the employment and the duties relating to it.

---

[1] "Referring to a law enforcement officer as Giglio impaired implies that an officer is not truthful or credible as a government witness." (Compl. ¶ 41.)

> Marston v. Minneapolis Clinic of Psychiatry and Neurology, 329 N.W.2d 306, 311 n.3 (Minn. 1982). See also McAdams, 64 F.3d at 1145 (quoting Marston, 329 N.W.2d at 312 [sic]).

(Filing 11 at 22-23.)

To convince me that the defendants were not acting within the scope of their employment when the allegedly defamatory statements were made, the plaintiffs refer me to three affidavits and a number of exhibits. The first affidavit is Douglas J. Domin's. Mr. Domin was the Special Agent in Charge of the Minneapolis office of the FBI at the relevant time, and his affidavit substantiates many of the claims set forth in the plaintiffs' complaint. For example, in his affidavit Mr. Domin stated that the plaintiffs were conducting a "FBI Title III narcotics investigation"; that there was "a lack of cooperation and friction" between the plaintiffs and DEA task force officers; that the plaintiffs prepared for their superiors a document (referred to as the "Chain of Events" memorandum) that summarized this friction; that Assistant United States Attorneys demanded a copy of this document; that after reviewing the document, Defendant Small, who was the Acting United States Attorney, instructed the FBI to "shut down" the Title III investigation and stated that the memo raised "Giglio issues" concerning the plaintiffs; that Defendant Small refused to reinstate the FBI investigation; that Defendant Small refused Mr. Domin's request to "bring the so-called `Giglio' issues before a U.S. District Court Judge for review and resolution"; and that during a meeting between Mr. Domin and Defendant Small wherein Mr. Domin asked for the reopening of the Title III investigation and for the Giglio issues to be placed before a district court judge, Mr. Small referred to Mr. Canada as "a fucking moron." (See generally Domin Aff.) Although this evidence is consistent with some of the plaintiffs' allegations, it must be recalled that I have already considered the complaint's allegations and

concluded that even if these allegations are true, they are insufficient to rebut the government's certification that the defendants were acting within the scope of their employment. (See filing 11 at 23-24.) The most significant "new" information provided by Mr. Domin's affidavit consists of his opinions that the plaintiffs' conduct was appropriate and did. not raise Giglio concerns, and that Mr. Small was irresponsible and motivated by personal bias when, "contrary to official U.S. Justice Department Giglio policy," he labeled the plaintiffs "Giglio impaired." (See Domin Aff. ¶¶ 18-19.)

The plaintiffs have also submitted the affidavit of Deborah Strebel Pierce for my consideration. Ms. Pierce succeeded Mr. Domin as SAC of the Minneapolis FBI office. (Compare Pierce Aff. ¶ 1 with Domin Aff. ¶ 1.) She stated that she is familiar with the Department of Justice's "Giglio Policy," and that she is not aware of any information that would place the plaintiffs within the ambit of that policy. (See Pierce Aff. ¶¶ 3-4 (citing Pierce Aff. Ex. A).) She also stated that while Defendant Heffelfinger has not provided her with "the factual basis for his labeling [the plaintiffs] as 'Giglio impaired'" in writing, he did indicate to her that the phrase "poor judgment" could be substituted for "Giglio impairment" with respect to each of the three plaintiffs. (See id. ¶¶ 5-6.) Ms. Pierce's affidavit is accompanied by a report dated June 10, 2002, concerning Plaintiff Canada. It states, on page four, as follows:

> In discussing the issue regarding SA Canada, USA Heffelfinger stated that his office considered the information in SA Canada's informal notes questioning the intentions and veracity of the DEA SA and BCA agent to be inaccurate. Reportedly, DEA OPR did not substantiate the allegations. This prompted the USAO to question SA Canada's integrity. USA Heffelfinger stated during the interview the

> situation was not a clearly discernible Giglio issue. However, it caused significant concern in his office. USA Heffelfinger mentioned that he personally has had several discussions with SAC Pierce regarding ways in which this matter can be resolved. To date, those efforts have not been successful and this problem has persisted. Based on the unsubstantiated perceptions, the USAO will no longer accept cases or evidence presented by SA Canada and prohibited his testimony in federal court in the District of Minnesota.

(Pierce Aff., Ex. B, Report dated 6/10/2002 at 4.) Also accompanying Ms. Pierce's affidavit is a FBI memorandum dated April 22, 2003, which advises that "the Office of Professional Responsibility (OPR) will not initiate an OPR inquiry relating to SA Robert Canada and the "chain of events" document. (Pierce Aff., Ex. C, FBI document dated 4/22/2003.) Finally, like Mr. Domin, Ms. Pierce opined that the plaintiffs' Giglio impairment was unwarranted. (See Pierce Aff. ¶ 10.)

The third and final affidavit submitted by the plaintiffs is that of Ray A. Morrow, who was one of two Assistant Special Agents in Charge (ASAC) at the Minneapolis FBI office at relevant times. Again, Mr. Morrow's affidavit substantiates many of the allegations set forth in the plaintiffs' complaint. (See generally Morrow Aff.) In particular, he provided a description of the context surrounding the creation of the plaintiffs' "chain of events" memorandum and the United States Attorney's Office's reaction to the memorandum. (See id.) He also stated that the defendants "inexplicably" placed the plaintiffs under a "Giglio cloud," but did not do so to the DEA agents who were named in the plaintiffs' "chain of events" memorandum. (See id. ¶ 1 1.a.)[2]

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[2] But see filing 22, Defs.' Ex. 3 at 1 (indicating that the United States

Furthermore, Mr. Morrow implied that the United States Attorney's Office arranged for these DEA agents to be "cleared of the allegations" before an investigation was completed. (See id. ¶ 11.b.) Mr. Morrow also stated that he "became aware" that various investigations led to no findings of misconduct on the part of the plaintiffs, and that therefore there can be no remaining "'Giglio' implications" for the plaintiffs. (See id. ¶ 11 .c-f.) Finally, he offered the following conclusion:

> The deliberate departure by Acting USA Small and USA Heffelfinger from well understood DOJ Giglio policy in placing and continuing the Giglio cloud on SA Canada, Deputy Bruce and Detective Perzichilli to this day can only be explained, in my judgment, as motivated by Small's and Heffelfinger's personal bias and malice against these outstanding law enforcement officers. There is simply no other conclusion to be drawn. Their conduct cannot possibly be deemed to be in the scope of their employment when it is so far departed from accepted DOJ policy and practice.

(Id. 112.) I have thoroughly considered all of the evidence submitted by the plaintiffs, and I find that it is insufficient to rebut the certification that the defendants were acting within the scope of their employment when they performed the actions that the plaintiffs complain of.

The plaintiffs suggest that the defendants' motivations are relevant to the question of whether they were acting within the scope of their employment. (See, e.g., Morrow Aff. ¶12; Domin Aff. ¶18.) The Eighth Circuit has recognized, however, that under Minnesota law, the question of "whether the employee was motivated by a desire to serve the

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Attorney's Office placed "Giglio" restrictions on the DEA agents cited by the plaintiffs in the "chain of events" memorandum).)

employer. . . is only relevant to negligence claims, not to intentional torts [such as defamation]." McAdams v. Reno, 64 F.3d 1137, 1145 n.7 (8th Cir. 1995). (quoting Marston v. Minneapolis Clinic of Psychiatry and Neurology, 329 N.W.2d 306, 310 (Minn. 1982)).

Similarly, I am not persuaded by the plaintiffs' suggestion that their' Giglio impairments were inappropriate, and therefore the defendants could not have been acting within the scope of their employment when imposing them. The fact that the plaintiffs and their witnesses disagree with the United States Attorneys' views that the "chain of events" memorandum raised Giglio concerns is simply not relevant to the question of whether the defendants' Giglio determinations were made while they were "performing services for which [they have] been employed or while [they were] doing anything which is reasonably incidental to [their] employment." McAdams v. Reno, 64 F.3d 1137, 1145 (8th Cir. 1995) (quoting Marston v. Minneapolis Clinic of Psychiatry and Neurology, 329 N.W.2d 306, 312 (Minn. 1982)).

The plaintiffs do not dispute that it is a United States Attorney's prerogative to impose "Giglio impairments" on law enforcement officers. Indeed, one of the plaintiffs' own exhibits, which was referred to by Ms. Pierce as the "Giglio policy," states that "[t]he purpose of this policy is to ensure that prosecutors receive sufficient information to meet their obligations under Giglio v. United States, 405 U.S. 150 (1972) ...." (Pierce Aff., Ex. A, at 1 (emphasis added).) Giglio, in turn, states that "it is the responsibility of the prosecutor" to disclose evidence affecting the credibility of an "important" witness to the government's case. Giglio, 405 U.S. at 154-55. Thus, I find that a United States Attorney's determination that a law enforcement officer's statements raise Giglio concerns falls squarely within the scope of his employment. His decision to notify the officer's employers

that the United States Attorney's Office will prosecute no cases that require the Giglio-impaired officer to appear as a material witness is also within the scope of his employment. In this case, the plaintiffs' evidence does not establish that the defendants' allegedly defamatory statements were not related to their Giglio determinations. On the contrary, the plaintiffs' evidence tends to show that the defendants were acting within the scope of their employment. As a result, I conclude that the United States must be substituted as defendant.[3] See 28 U.S.C. § 2679(b)(1), (d); McAdams v. Reno, 64.F.3d 1137, 1144-45 (8th Cir. 1995); Brown v. Armstrong, 949 F.2d 1007, 1010 (8th Cir. 1991).

In the brief submitted in support of their original motion to dismiss, the defendants argued that upon substitution of the United States as defendant in this case, the action must be dismissed due to the plaintiffs' failure to

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[3] As I noted in my prior memorandum,

[T]he plaintiffs' emotional distress claim is allowed under Minnesota law to the extent that "there has been a 'direct invasion of the plaintiffs' rights such as that constituting slander, libel, . . . or other like willful; wanton, or malicious conduct.'" Lickteig v. Alderson, Ondov, Leonard & Sween, P.A., 556 N.W.2d 557, 560 (Minn. 1996) (quoting State Farm Mut. Auto. Ins. Co. v. Villiage of Isle, 122 N.W.2d 36, 41 (1963)). See also id. at 560: (discussing the availability of emotional distress. damages under Minnesota law). In other words, it is my view that because the plaintiffs have not alleged that they were in a "zone of danger," id., Count III of the plaintiffs' complaint does not set forth an independent cause of action against the defendants, but instead alleges, in effect, that the defendants are entitled to recover emotional damages under their defamation claim. "Thus, if [the plaintiffs'] defamation action stands, [they] may assert negligent infliction of emotional distress. Otherwise, there is no basis for the cause of action under these facts." Bohdan v. Alltool Mfg. Co., 411 N.W.2d 902, 907 (Minn. [Ct. App.] 1987). This means that there is no need to analyze separately whether the defendants were acting in the scope of their employment when they allegedly negligently inflicted emotional distress upon the plaintiffs.

(See filing 11 at 23 n.12.)

exhaust their administrative remedies. (See filing 8 at 19 (citing 28 U.S.C. § 2675).) The plaintiffs did not dispute this argument, and I agree with the defendants that the plaintiffs' remaining claims must now be dismissed. See 28 U.S.C. § 2675; see also 28 U.S.C. § 2680(h) (providing that no tort claim based upon libel, slander, or misrepresentation may be had under the Federal Tort Claims Act); McAdams v. Reno, 64 F.3d 1137, 1144 (8th Cir. 1995) ("If substitution of the United States was appropriate, the defamation claim must be dismissed because the FTCA does not waive sovereign immunity for such claims."); cf. Lawson v. United States, 103 F.3d 59, 60 (8th Cir. 1996).

IT IS ORDERED that:

1. the defendants' motion to dismiss, filing 7, is granted.
2. the defendants' motion to strike, filing 21, is denied as moot.

Dated May 5, 2004.

BY THE COURT
s/
Warren K. Urbom
United States Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

DAVID BRUCE, ROBERT CANADA, AND THOMAS PERZICHILLI,	)
	) NO. 03-3406 WKU
PLAINTIFFS,	) **UNDER SEAL**
	)
vs.	)
	)
THOMAS B. HEFFELFINGER, UNITED STATES ATTORNEY FOR THE DISTRICT OF MINNESOTA INDIVIDUALLY, AND	)
	)
ROBERT SMALL, ASSISTANT UNITED STATES ATTORNEY FOR THE DISTRICT OF MINNESOTA INDIVIDUALLY.	)
DEFENDANTS.	)

STIPULATION TO EXTEND THE TIME FOR FILING NOTICE OF APPEAL

WHEREAS, this matter was placed under seal by the court in its Order dated June 12, 2003, pursuant to a request by defendants and an agreement between the parties to temporarily seal this matter; and

WHEREAS, Judgment was entered on May 5, 2004 by Order of this court dismissing the Complaint in this matter; and

WHEREAS, Rule 4 (a)(1)(B) of the Federal Rules of Appellate Procedure provides that the notice of appeal required by Rule 3 may be filed within 60 days after judgment is entered when the United States or its officer or

agency is a party to the case; and

WHEREAS, plaintiffs intend to move this court for an Order removing the seal of this matter which motion should be brought before the district court while it still has jurisdiction over the matter; and

WHEREAS the defendants have informed the plaintiffs that they will oppose their motion, and

WHEREAS, additional maybe required for briefing, hearing and deciding plaintiffs' motion

WHEREAS, Rule 4 (a)(5)(A) of the Federal Rules of Appellate Procedure provides that the district court may extend the time to file a notice of appeal if a party timely moves and shows good cause for said extension; and

beyond what is now available under the deadline for filing the notice of appeal; and

WHEREAS, the court has been advised of these matters by counsel for the parties in a telephonic conference with the court;

IT IS THEREFOR STIPULATED AND AGREED by and between the parties through their respective counsel that the court may issue an Order extending the deadline for filing the notice of appeal to August 4, 2004, which is an additional 30 days for said filing.

DATED: JUNE 16, 2004

s/_____

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ATTORNEYS FOR PLAINTIFFS

DATED: June 14, 2004

s/

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UNITED STATES DEPT. OF JUSTICE
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BEN FRANKLIN STATION
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ATTORNEYS FOR DEFENDANTS

ORDER ON STIPULATION FOR EXTENSION OF TIME

Based upon the stipulation of the parties,

IT IS ORDERED that plaintiffs shall have until August 5, 2004 to file their notice of appeal of the May 5, 2004, Judgment dismissing the Complaint in this case.

Dated:

BY THE COURT

s/

Warren K Urbom
United States Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

DAVID BRUCE, ROBERT CANADA, AND THOMAS PERZICHILLI, PLAINTIFFS, vs.	) NO. 03-SC-3406 WKU **UNDER SEAL**
THOMAS B. HEFFELFINGER, UNITED STATES ATTORNEY FOR THE DISTRICT OF MINNESOTA INDIVIDUALLY, AND	
ROBERT SMALL, ASSISTANT UNITED STATES ATTORNEY FOR THE DISTRICT OF MINNESOTA INDIVIDUALLY. DEFENDANTS.	

Order On Consent Motion For Extension of Time

Upon consideration of the defendants motion to extend the time within which they may oppose the plaintiffs' pending motion to set aside the order sealing the files and records of this case, and further extending the time within which the plaintiffs may file their Notice of Appeal,

IT IS ORDERED that the defendants shall have until July 30, 2004 to file their opposition to plaintiffs' motion, and

IT IS FURTHER ORDERED that the plaintiffs may file a Notice of Appeal from the of the May 5, 2004 Judgment dismissing the Complaint in this case on or before the 20th day following the entry of this Court's Order on the plaintiffs' pending motion.

Dated: July 20, 2004

BY THE COURT

s/_____

Warren K Urbom
United States Senior District Judge

FILED 7-22-04
RICHARD D. SLETTEN, CLERK

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA

DAVID BRUCE, ROBERT CANADA, AND THOMAS PERZICHILLI,	)
	) NO. 03-3406 WKU
Plaintiffs,	)
vs.	)
	)
THOMAS B. HEFFELFINGER, UNITED STATES ATTORNEY FOR THE DISTRICT OF MINNESOTA Individually, and	)
	)
ROBERT SMALL, ASSISTANT UNITED STATES ATTORNEY FOR THE DISTRICT OF MINNESOTA Individually.	)
Defendants.	)

ORDER ON PLAINTIFFS' MOTION TO REMOVE THE SEAL FROM ALL PLEADINGS, DOCUMENTS AND MEMORANDUM OPINIONS IN THIS CASE

On June 12, 2003, United States Chief District Judge James M. Rosenbaum signed an order that said:

> The parties, through their respective counsel, have agreed to temporarily seal this matter, subject to reopening by the District Judge to whom this case is ultimately assigned. Accordingly, IT IS ORDERED that:
>
> 1. This matter shall be filed under seal.
>
> 2. This Order is imposed without prejudice to any further orders touching this issue which may be entered hereafter.

The plaintiffs now have moved to remove the seal. I find that it should be removed, because there is no reason for its continuing to be in place.

IT IS ORDERED that the Order of June 12, 2003, temporarily sealing this matter is hereby amended and all pleadings, documents and other matters filed in this case are hereby unsealed.

Dated October 1, 2004.

BY THE COURT

s/

Warren K. Urbom

United States Senior District Judge

Karen Barry

From: <ecf-notice@mnd.uscouits.gov>
To: <ecf-notice@mnd.uscourts.gov>
Sent: Monday, October 04, 2004 1:59 PM
Subject: Activity in Case 0:03-sc-03406-WKU Bruce et al v. United States of America "Case Unsealed"

NOTE TO. PUBLIC ACCESS USERS You may view the filed documents once without charge. To avoid later charges, download a copy of each document during this first viewing.

U.S. District Court
District of Minnesota

Notice of Electronic Filing
The following transaction was entered on 10/4/2004 at 1:59 PM CDT and filed on 10/4/2004
Case Name: Bruce et al v. United States of America
Case Number: 0:03-sc-3406
Filer:
WARNING: CASE CLOSED on 05/05/2004
Document Number:

Docket Text:
ORDER that this Case is unsealed. Signed by Judge Warren K Urbom on 10/1/2004. (DFL)

The following documents(s) are associated with this transaction:
0:03-sc-3406 Notice will be electronically mailed to:
William James Mavity bmavity@pclink.com,
karen-blo@gwest.net
R Joseph Sher joseph.sher@usdoj.gov
;03-sc-3406 Notice will not be electronically mailed to:

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

David Bruce, Robert Canada,) and Thomas Perzichilli,	)	
	)	Civ. No. 03-SC-3406 (WKU)
Plaintiffs,	)	**UNDER SEAL**
vs.	)	
	)	
Thomas B. Heffelfinger, United States Attorney for the District of Minnesota individually; and	)	**NOTICE OF APPEAL**
	)	
Robert Small, Assistant United States Attorney, District Of Minnesota individually.	)	
Defendants.	)	

Notice is hereby given that David Bruce, Robert Canada and Thomas Perzichilli, plaintiffs in the above named case, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the final Judgment dismissing plaintiffs' Complaint, entered in this action on the 5th day of May, 2004, and all previous rulings and orders of the Honorable Wayne K. Urbom, United States Senior District Judge, that led up to and served as predicates for that final judgment.

October 14, 2004

By: s/_____
William J. Mavity
Attorney for the plaintiffs
First National Bank Building, #209
2835 South Service Drive
Red Wing, Minnesota 55066

U.S. COURT OF APPEALS - EIGHTH CIRCUIT

APPELLANT'S FORM A

Appeal Information Form

To be filed with the Notice of Appeal

Appeal Docket No. _____

STYLE OF CASE:	COUNSEL: NAME, ADDRESS, AND TELEPHONE NUMBER
David Bruce, Robert Canada and Thomas Perrichilli, Appellants, Appellant/Appellee, vs.	William J. Mavity 2835 South Service Drive, Suite 209 Red Wing, Minnesota 55066 T: 800 339-3008
Thomas B. Heffelfinger, United States Attorney for the District of Minnesota, individually, and Robert Small, Assistant United States Attorney for the District of Minnesota, individually, Appellant/Appellee	COUNSEL: NAME, ADDRESS, AND TELEPHONE NUMBER R. Joseph Sher Senior Trial Counsel, Torts Branch Civil Division, United States Dept. of Justice P.O. Box 7146, Ben Franklin Station Washington, D.C. 20044 T: 202 616-4328

LIST ISSUES ON APPEAL(For administrative purposes). You may indicate that this also serves as your statement of issues under FRAP 10(b)(3). [X] Yes. [ ] No.

See attached Statement of Issues

FOR LEAD COUNSEL ONLY

I [ ] have [X] have not) discussed settlement possibilities on appeal with my client.

This appeal [ ] is [ ] is not) amenable to settlement.

Submitted by: William J. Mavity 10-14-04

Signature of Lead Counsel Date

INSTRUCTIONS:

Filing of appellant's Form A is required to be submitted to the Clerk of the District Court with the Notice of Appeal (8 Cir. Rule 3(b). If inadvertently omitted, appellant may file Form A directly with the Clerk of the Court of Appeals before appeal is docketed. Forms are available at the District Court Clerk's Office and may be obtained electronically at www.ca8.uscourts.gov

Copy 1 - Send to Appellee (together with an uncompleted Form B)

Copy 2 & 3 - Send to Clerk, District Court with Notice of Appeal or Eighth Circuit (see above)

Copy 4 - Retain

[ ] I certify that the original of this pleading has been signed and that I will maintain the pleading in accordance with 8th Cir.R. 25A(e).

STATEMENT OF ISSUES

First Amendment Issues

Whether the "Chain of Events" document drafted by the plaintiffs was protected speech entitling the plaintiffs to relief under the First Amendment.

Whether the fact that the plaintiffs prepared the "Chain of Events" notes at the direction of their supervisor means that they did not act as concerned citizens but only as employees following orders for job-related reasons thereby depriving them of the protection of the First Amendment.

Whether the holding in *Buazard v. Meridith*, 172 F.3d 546 (8th Cir. 1999), relied on by the district court in dismissing plaintiffs' First Amendment claims, that a law enforcement officer who makes a statement about police misconduct at the direction of his superiors does so not "as a concerned citizen" but just as an employee who is "following orders" for "job related reasons," conflicts with the U.S. Supreme Court holding in *Connick v. Meyers*, 461 U.S. 138 (1983) that statements concerning potential misconduct by government officials address matters of public concern.

Whether the defendants are entitled to qualified immunity from liability under plaintiffs' First Amendment claim.

Defamation Issues

Whether the defendants' statements to third parties that the plaintiffs were "*Giglio* impaired", "committed violations", "committed misconduct" and defendant Small's statement to FBI SAC Domin that plaintiff Canada was a "fucking moron," were well-known hazards and risks of employment

foreseeable from the nature of defendants' positions and the duties relating to them, and therefore within their scope of employment.

Whether the defendants' statements to third parties that the plaintiffs were "*Giglio* impaired", "committed violations", "committed misconduct" and defendant Small's statement to FBI SAC Domin that plaintiff Canada was a "fucking moron," were made with malice and the intent to cause harm to plaintiffs' employment, reputation and standing as law enforcement officers.

Whether substitution of the United States as the defendant in this case was appropriate in light of the defamatory comments made by defendants about plaintiffs' conduct as law enforcement officers.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

David Bruce, Robert Canada, and Thomas Perzichilli,

Civ. No. 03-3406(WKU)
UNDER SEAL

Plaintiffs,

AFFIDAVIT OF SERVICE BY MAIL AND FACISIMILE

vs.

Thomas B. Heffelfinger, United States Attorney for the District of Minnesota individually; and

Robert Small, Assistant United States Attorney, District Of Minnesota individually.

Defendants.

STATE OF MINNESOTA)
) ss
COUNTY OF GOODHUE)

Karen L. Barry, of the City of Red Wing, County of Goodhue, State of Minnesota, being duly sworn, says that on October 15, 2004, she served a copy of NOTICE OF APPEAL, U.S. COURT OF APPEALS - EIGHTH CIRCUIT APPELLANT'S FORM A, and U.S. COURT OF APPEALS - EIGHTH CIRCUIT APPELLEE'S FORM B upon the following person, via facsimile and U.S. Mails to his last known address copies thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Red Wing, Minnesota directed to said individual at the following address:

Mr. R. Joseph Sher
Senior Trial Counsel, Torts Branch, Civil Division

United States Department of Justice
P. O. Box 7146
Ben Franklin Station
Washington, D. C. 20044
Facsimile No. (202) 616-4314

s/
Karen Barry

Subscribed and sworn to before me
this 15th day of October, 2004.
s/
Anita Reuss
Notary Public

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-3927
David Bruce; Robert Canada;
Thomas Perzichilli,

Appellants,

Appeal from the United States District Court for the District of Minnesota

vs.

Thomas B. Heffelfinger,. United States Attorney, District of Minnesota, individually;
Robert Small, Assistant United States Attorney, District of Minnesota, individually,

Appellees.

JUDGMENT

The motion of appellee for dismissal of this appeal is granted. The appeal is hereby dismissed for lack of jurisdiction. See Eighth Circuit Rule 47A(b).
(5361-010199)

February 28, 2005

Order entered at the Direction of the Court
s/_____.
Michael E. Gans
Clerk, U. S. Court of Appeals, Eighth Circuit

William J. Mavity

From: "Eighth Circuit U.S. Court of Appeals Clerks Office" <via no reply@ck8.uscourt.gov>
To: "William James Mavity" <bmavity@qwest.net>
Sent: Thursday, May 12, 2005 2:44 PM
Subject: Via Notice for case 04-3927

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-3927

David Bruce, et al.,

Appellants,

v.

Order Denying Petition for Rehearing and for Rehearing En Banc

Thomas B. Heffelfinger, etc., et al.,

Appellees.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.
(5128-010199)

May 12, 2005

Order Entered at the Direction of the Court:
Clerk, U. S. Court of Appeals, Eighth Circuit

----------VIA TRANSMISSION----------

United States Court of Appeals for the Eighth Circuit Circuit
Clerks Office
Voice: 3.14-244-2400 Fax: 314-244-2780

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